92-854

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CENTRAL BANK OF DENVER, N.A.,

Petitioner,

v.

FIRST INTERSTATE BANK OF DENVER, N.A. and JACK K. NABER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Can an indenture trustee in a bond financing be liable as an aider and abettor of a Rule 10b-5 violation where it does not breach any of its indenture duties?

2. Does recklessness satisfy the scienter requirement for aiding and abetting even where there is no breach of a duty to disclose or to act?

RULE 29.1 LIST

A. PARENT COMPANIES

Central Bank of Denver, N.A. is wholly owned by Central Bancorporation, Inc., which is wholly owned by First Bank Systems, Inc.

B. SUBSIDIARIES (EXCEPT WHOLLY OWNED SUBSIDIARIES)

Central Bank of Denver, N.A. owns 50% of the shares of Rocky Mountain Bankcard, Inc.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Central Bank of Denver, N.A. ("Central Bank") respectfully requests that a writ of certiorari be issued to review a decision of the United States Court of Appeals for the Tenth Circuit entered on July 8, 1992. The Tenth Circuit reversed the Order of the United States District Court for the District of Colorado granting summary judgment in favor of Central Bank.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 969 F.2d 891, and is reproduced in the Appendix at A-3. The Order of the United States District Court for the District of Colorado is reproduced in the Appendix at A-29.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1992. (Appendix A-3.) Central Bank's Petition for Rehearing was denied on August 18, 1992. (Appendix A-1.) This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1988).

STATUTE AND RULE INVOLVED

Section 315 of the Trust Indenture Act of 1939, 15 U.S.C. §77ooo (1988), and S.E.C. Rule 10b-5, 17 C.F.R. §240.10b-5 (1989), are reproduced in the Appendix at A-37.

STATEMENT OF THE CASE

In 1986, and again in 1988, the Colorado Springs-Stetson Hills Public Building Authority (the "Authority") issued tax-exempt municipal bonds to finance the acquisition of public improvements built by the developer of Stetson Hills, a planned residential and commercial community in Colorado Springs, Colorado. Repayment of the bonds was to be made from assessments charged on sales of lots from the developer to homebuilders. Repayment was secured by land which was required to have an appraised value of 160% of the outstanding principal and interest based on a forced liquidation appraisal performed by an MAI appraiser ("160% Test").

Central Bank served as the indenture trustee for both bond issues. Central Bank's duties as trustee are specifically set forth in respective Indentures of Trust for the two bond issues. The operative provisions of the two Indentures are identical.

After both the 1986 and 1988 bonds went into default in 1989, the plaintiffs, who had purchased 1988 bonds, brought an action against participants in the issuance, including Central Bank, alleging that the sale of the bonds was in violation

of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78(j)(b) (1988), and Securities & Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5 (1989), promulgated thereunder. Plaintiffs claim that Central Bank aided and abetted the Rule 10b-5 violation of other defendants.

In early 1988, Central Bank received an updated appraisal of the land securing the 1986 bonds performed by Joseph Hastings ("Hastings"). The underwriter for the 1986 bonds raised concerns that the 160% Test for the 1986 bonds was not being met and that Hastings' appraisal was outdated. As a result of ambiguities in the bond documents and concerns over whether the 160% Test had been calculated correctly, the developer agreed to contribute additional land to secure the 1986 bonds. Central Bank asked its in-house appraiser to review the updated appraisal. His review raised questions as to the age of the comparables and whether the appraisal appropriately incorporated a bulk sale methodology in a forced liquidation context. Central Bank initially suggested that an independent review of the appraisal be done to follow up on these questions.

At a subsequent meeting, Central Bank was informed that Hastings had, in fact, reviewed more recent comparables which did not materially affect values in the appraisal and correctly followed the bulk sale methodology. Thereafter, Central Bank approved a resolution of the issue which required that Hastings supplement his current appraisal to respond to Central Bank's concerns on comparables and bulk sale methodology, that annual appraisals of land securing the 1986 and 1988 bonds be performed beginning December 1, 1988, that additional property with an approximate value of $2,000,000 be added to the assessment lien to bring the 160% Test into compliance for the 1986 bonds and that certificates be provided by Hastings certifying that compliance. The additional land was pledged for the 1986 bonds and the required certificates of compliance were executed. Thereafter on June 15, 1988, the 1988 bonds were issued.

Plaintiffs claim that the 1988 bonds were issued and marketed through a fraudulently misleading disclosure document which did not disclose the questions raised concerning the Hastings appraisal and the 160% Test in connection with the 1986 bonds, and by means of a scheme allegedly intended to assure that an independent review of the appraisal be delayed until six months after the 1988 bonds were issued. Aiding and abetting liability against Central Bank is predicated upon its decision as trustee not to insist upon an independent review of the Hastings appraisal or a new appraisal prior to issuance of the 1988 bonds.

Central Bank moved for, and was granted, summary judgment. (Appendix A-35.) The district court held that the scienter requirement for aider and abettor liability "may not be satisfied by showing recklessness absent an additional duty to disclose." (Appendix A-33.) On July 8, 1992, the Tenth Circuit reversed, holding that recklessness was sufficient to satisfy the scienter requirement in a case based on assistance by action, (Appendix A-25), even where all of Central Bank's conduct comported with its Indenture duties and there was no breach of a duty to disclose or to act. On August 18, 1992, the Court of Appeals denied Central Bank's Petition for Rehearing. (Appendix A-2.)

ARGUMENT FOR GRANTING THE WRIT

The Tenth Circuit concluded that there was a genuine issue of material fact as to whether Central Bank's conduct was reckless even though Central Bank's duties are strictly defined and limited to the terms of the Indenture and none of those duties were breached, and even though the "assistance by action" forming the basis of aider and abettor liability was the proper exercise of a discretionary right under the Indenture. This conclusion not only eviscerates the protections for indenture trustees established by Congress in the Trust Indenture Act of 1939, 15 U.S.C. §§77aaa to 77bbbb (1988), it also confounds the legal standards applicable to indenture

trustees, who play a vital role in the corporate and municipal financing mechanism. The inevitable consequences of the decision are either a reduction in the availability of such financings due to the unwillingness of financial institutions to risk participation or a substantial increase in the cost of such financings which will further burden economic development.

Moreover, the Tenth Circuit's conclusion that recklessness satisfies the scienter requirement in an aiding and abetting case, notwithstanding the absence of a breach of duty, further confuses an increasingly unsettled area of securities law — the degree of scienter required for aiding and abetting liability. While the federal circuits were once in agreement as to the circumstances under which recklessness would support aiding and abetting liability, in recent years that uniformity has severely fractured. Now there are at least three distinct tests, one of which is pushed even further from the old uniform standard by the Tenth Circuit's decision effectively reducing the scienter requirement to recklessness. Consequently, banks, as well as lawyers, accountants and other professionals who typically participate in such financing, are left with no clear guidelines as to their standard of conduct.

A writ should issue to enable the Court to more clearly define the legal standards applicable to those who participate in this critical area of commerce.

I. THE TENTH CIRCUIT'S DECISION DESTROYS THE PROTECTION OF INDENTURE TRUSTEES THAT CONGRESS INTENDED BY THE TRUST INDENTURE ACT.

While the Tenth Circuit recognizes that the duties of Central Bank, as indenture trustee, "are strictly defined and limited to the terms of the indenture" (Appendix A-20), and that "Central Bank did not breach a duty under the indenture" (Appendix A-28), it nonetheless concludes that plaintiffs have presented a genuine issue of fact as to whether

"agreeing to delay the independent review [of the Hastings appraisal] was an extreme departure from the standards of ordinary care." (Appendix A-26.)

The court is correct that Central Bank's obligations, and thus its duties of care, are defined by the Indenture. While the Indenture grants Central Bank broad discretion in performing its trustee duties, it has no duties outside those specified in the Indenture, and it is undisputed that Central Bank did not breach any of its Indenture duties. It is simply a logical impossibility for Central Bank's conduct to be simultaneously in compliance with the terms of the Indenture and yet "an extreme departure from the standards of ordinary care."

Courts in other circuits recognize the limited role, and thus the limited obligations, of indenture trustees. In *Elliott Assoc. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 71 (2d. Cir. 1988), the Second Circuit concluded that "so long as the trustee fulfills its obligations under the express terms of the indenture, it owes the debenture holders no additional, implicit pre-default duties or obligations . . . ."[1] Similarly, in *Lorenz v. CSX Corp.*, 736 F. Supp. 650, 658 (W.D. Pa. 1990) (citations omitted), the Court recognized that:

> [W]here the duties of an issuer (and a Trustee) to debenture holders are circumscribed by the Indenture Agreement, no extraordinary duties will be implied under the federal securities laws.

[1] In *Elliott Assoc.*, the plaintiff alleged that the trustee breached its fiduciary duty by waiving a 50-day notice requirement in connection with a debenture redemption, resulting in the loss of a $1.2 million interest payment to debenture holders. The Second Circuit affirmed the district court's dismissal of the action, holding that the indenture granted the trustee the discretion to waive the notice requirement, and that the trustee had no duties outside those stated in the indenture; therefore it had no fiduciary duty. Likewise, in this case the Indenture gave Central Bank the discretion to determine when and if an independent review of the appraisal should be done, and Central Bank had no duties outside those stated in the Indenture.

> We have not uncovered any contrary authority, imposing on an Indenture Trustee greater duties under § 10(b) than are required by the Indenture . . . . There is likewise no authority for the premise that an Indenture Trustee who complies with the requirements of the Indenture can still be liable for his silence as an aider and abettor to another's violation.

The Tenth Circuit's unprecedented conclusion that a trustee could be reckless even when it does not breach its duties is not only contradicted by these other decisions; it also directly conflicts with the provisions, policy and legislative history of the Trust Indenture Act of 1939. Indenture trustees, as intermediaries between issuer and bondholders, are an essential component of corporate and municipal financing.[2] Banks play an integral role in the trust indenture process that brings this type of financing to the public market. *Meckel v. Continental Resources Co.*, 758 F.2d 811, 815 (2d Cir. 1985). Congress expressly and deliberately limited the liability of an indenture trustee to further these important

[2] The legislative history of the Trust Indenture Act states the following:

> Although the trust indenture was originally devised to meet technical legal requirements in connection with the enforcement of mortgages securing obligations held by several holders, its use has become a practical necessity where bonds are to be nationally distributed among investors in a number of States, whose individual holdings are likely to be small. Even if the average bondholder had the necessary initiative and knowledge, it would acquire a disproportionate expenditure of time and money for him to attempt to make an individual check upon the performance of the obligations assumed by the obligor, or to enforce his rights by individual action. Duplication of effort and expense is avoided through the issuance of the bonds under a trust indenture which vests in the indenture trustee powers with respect to enforcement of the issuer's obligations and the bondholder's rights.

S. Rep No. 248, 76th Cong., 1st Sess. 3 (1939).

policy considerations. The original draft of the Act imposed an overriding obligation on the Trustee to adhere to a prudent person's standard. However, after extensive committee hearings, the final bill which was adopted did not impose any obligations other than those contained in the express terms of the trust indenture. *Elliott Assoc. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d at 71. With respect to a trustee's pre-default duties, like those at issue here, Section 315 of the Trust Indenture Act as originally enacted permits the indenture to provide that "the indenture trustee shall not be liable except for the performance of such duties as are specifically set out in such Indenture . . . ." 15 U.S.C. § 77ooo (1988).[3] Thus, Congress encouraged participation by indenture trustees and protected their discretion and their vital role in the corporate and municipal financing mechanism.

The Indenture in this case complies with the principles and requirements of the Trust Indenture Act. Central Bank, as trustee, was to "perform such duties and only such duties as are specifically set forth in this Indenture." (Indenture, § 9.01(a).)[4] The Indenture provides that "the Trustee shall not be responsible for . . . the sufficiency of the security for the Bonds issued hereunder or intended to be secured hereby." (Indenture, § 9.01(c).) However, the Indenture grants the trustee very broad discretion by providing that:

> Notwithstanding anything elsewhere in this Indenture with respect to . . . any action whatsoever within the purview of this Indenture, the Trustee shall have the right, but shall not be required, to demand any showings, certificates, opinions,

[3] In 1990 this section was amended to state that the indenture will automatically be deemed to include such a provision unless expressly excluded. 15 U.S.C. § 77ooo (Supp. II 1990).

[4] Article IX of the Indenture of Trust dated May 15, 1988 is reproduced in the Appendix at A-41.

> appraisals or other information . . . deemed desirable for the purpose of . . . any other action by the Trustee.

(Indenture, § 9.01(k).) And yet, it is Central Bank's ultimate decision not to exercise that discretionary right to require an independent review of the Hastings appraisal prior to the issuance of the bonds that forms the basis for the claim of extreme departure from the trustee's standard of care. Here, again, the Indenture clearly protects a trustee's discretion to delay exercising a right or to forego it altogether: "The permissive right of the Trustee to do things enumerated in this Indenture shall not be construed as a duty . . . " (Indenture, § 9.01(g).)

The Tenth Circuit's decision has the precise chilling effect on trustees that Congress intended to eliminate. Often, as in this case, exercise of a trustee's discretion involves choosing alternative courses of action including affirmative acts or even inaction. Because an indenture trustee, unlike an ordinary trustee, stands in a unique position between the issuer and the bondholders,[5] it is inherently difficult to judge whether an indenture trustee has chosen the proper course. Clearly, by making trustees accountable only for failure to perform their express duties, Congress intended to protect a trustee's exercise of discretion from challenge in order to encourage their involvement in such financing and the exercise of their discretion to solve problems that may arise in such financing. In hindsight, a trustee's exercise of discretion may turn out to be the wrong decision. If trustees can be second guessed, as Central Bank has been here by the plaintiffs, they will be hesitant to take any action to resolve

[5] In *Elliot Assoc, v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d at 71, the Second Circuit recognized the divided loyalty of indenture trustees: "[W]e have consistently rejected the imposition of additional duties on the trustee in light of the special relationship that the trustee already has with *both the issuer and the debenture holders* under the indenture." (Emphasis added.)

problems which arise, or worse, they will be deterred from acting as trustees for fear of violating an unspecified duty imposed after the fact by judge or jury in the context of aiding and abetting liability for alleged recklessness.

The Tenth Circuit's decision ignores the express terms of the Indenture and the mandate of Congress that trustees be protected from the kind of second guessing in which the plaintiffs and the Tenth Circuit engage.

II. THE TENTH CIRCUIT'S DECISION, EFFECTIVELY ESTABLISHING RECKLESSNESS AS THE UNIFORM STANDARD FOR SCIENTER, CONFLICTS WITH THE MAJORITY OF THE FEDERAL CIRCUITS.

In reaching its conclusion that Central Bank's conduct raised genuine issues of material fact as to whether it acted recklessly, the Tenth Circuit first determined that recklessness satisfies the scienter element of an aiding and abetting case based on assistance by action, even in the absence of a duty to disclose. (Appendix A-25.) This conclusion conflicts with decisions of a majority of the federal circuits.

This Court has held that to be liable under the federal securities laws, one must have acted with the requisite scienter, that is, an "intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976), *reh'g denied*, 425 U.S. 985 (1986). However, the Court left open the question of whether recklessness satisfies the scienter requirement. Mindful of the Court's requirement of intent, the majority of federal circuits require proof of three elements for aiding and abetting: 1) a securities violation by a primary violator; 2) knowledge of the wrong by the alleged aider and abettor and of his role in it; and 3) substantial assistance. *See, e.g., Schatz v. Rosenberg*, 943 F.2d 485, 495 (4th Cir. 1991); *Cleary v. Perfectune, Inc.*, 700 F.2d 774, 777 (1st Cir. 1983); *Stokes v. Lokken*, 644 F.2d 779, 782-783 (8th Cir. 1981); *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 94-97 (5th Cir. 1975).

The majority of federal courts have concluded that recklessness satisfies the scienter requirement for aiding and abetting liability only in limited circumstances — where there is a duty to disclose. Where there is no disclosure duty, the scienter requirement for aiders and abettors remains conscious intent to defraud.

> [D]espite allegations of Bear Stearns' reckless disregard of the facts — and even assuming for present purposes that the requisite standard of recklessness has been adequately pleaded — absent a fiduciary duty owing from Bear Stearns to Ross there is no aiding and abetting liability . . . [I]f there is no fiduciary duty — and appellants concede there is none here — the scienter requirement increases, so that appellants need to show that Bear Stearns acted with actual intent.

Ross v. Bolton, 904 F.2d 819, 824 (2d Cir. 1990); *see also IIT v. Cornfeld*, 619 F.2d 909, 925 (2d Cir. 1980) (when it is impossible to find a duty of disclosure, an alleged aider and abettor should be found liable only if scienter of the high "conscious intent" variety can be proved); *Cleary v. Perfectune, Inc.*, 700 F.2d 774, 777 (1st Cir. 1983) ("Courts generally have held that in the absence of a duty of disclosure, a defendant should be held liable as an aider and abettor only if the plaintiff proves that the defendant had actual knowledge of the improper activity of the primary violator and of his role in that activity."); *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1128 (5th Cir. 1988) ("Aroused suspicions, however, do not constitute actual awareness of one's role in a fraudulent scheme. Moreover, to prove plainly that an alleged abettor intended to violate the securities laws, plaintiffs must prove more than that the abettor recklessly ignored danger signals."), *cert. denied*, 492 U.S. 918 (1989), *and vacated on other grounds sub nom. Fryar v. Abell*, 492 U.S. 914 (1989);

Woods v. Barnett Bank of Fort Lauderdale, 765 F.2d 1004, 1009-11 (11th Cir. 1988) (recklessness satisfied the scienter requirement because the defendant assumed a special duty to disclose).[6]

In deciding this case, the Tenth Circuit rejected the majority view and adopted the minority position maintained by the Ninth Circuit.[7] The Ninth Circuit has eliminated the requirement of a duty to disclose which effectively establishes recklessness as the universal standard for scienter. While the Ninth Circuit requires the same three elements of aiding and abetting as the majority of federal circuits, it concludes that "[t]he secondary violator's duty to disclose may arise from a "knowing assistance of or participation in a fraudulent scheme." *Roberts v. Peat, Marwick, Mitchell & Co.*, 857 F.2d 646, 653 (9th Cir. 1988). Thus, under the Ninth Circuit's test, when an alleged aider and abettor substantially assists a primary violation (that is, whenever the third

[6] The Seventh Circuit requires even more. In addition to knowiedge and substantial assistance, an aider and abettor must have also committed one of the "manipulative or deceptive" acts prohibited under Rule 10b-5(2) with the same degree of scienter that primary liability requires. *Robin v. Arthur Young & Co.*, 915 F.2d 1120, 1123 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1317 (1991). Thus, where the first element of aider and abettor liability in the other circuits merely requires a primary violation by the one the aider and abettor assists, the Seventh Circuit requires essentially a primary violation by the aider and abettor himself; that is, the aider and abettor must have made either an untrue statement of material fact or an omission of a material fact in breach of a duty to disclose with the intent to mislead and which causes plaintiff's loss. *Id.* at 1123 n.4, 1125.

[7] The Court's opinion also relies on *FDIC v. First Interstate Bank, N.A.*, 885 F.2d 423 (8th Cir. 1989). (Appendix A-25.) Yet that decision, and a subsequent Eighth Circuit case, *Camp v. Dema*, 948 F.2d 455 (8th Cir. 1991), require more than recklessness in the absence of a duty to disclose. "Because Kidder did not owe Camp a duty to disclose, the knowledge requirement may not be satisfied by recklessness." *Camp*, 948 F.2d at 462 (citing *FDIC*, 885 F.2d at 432-433).

element is met), a duty to disclose automatically arises.[8] In *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478 (9th Cir. 1991), the Ninth Circuit drops the pretense of the duty to disclose requirement altogether, and simply concludes that recklessness suffices where there is assistance by action.

Following Levine, the Tenth Circuit states that

> The Ninth Circuit's recent opinion in *Levine* is particularly enlightening . . . the *Levine* court considered the case before it as one based on assistance by action and for that reason expressly found irrelevant a question whether the alleged aiders-and-abettors had a duty to disclose. Further, in holding that the plaintiff's allegations adequately stated claims for aiding-and-abetting liability, the court applied a recklessness standard.

(Appendix A-24.) (Citations omitted.) Thus, the Tenth Circuit concludes that recklessness satisfies the scienter requirement even though it expressly finds no duty to disclose and even though the "assistance by action" was nothing more than the discretionary decision not to act permitted by the Indenture.

The flaw in the analysis of the Tenth, as well as the Ninth, Circuits is monumental. Successful financing necessarily involves participation by several independent professionals including accountants, appraisers, lawyers, indenture trustees, investment bankers and others who each "assist" in the financing by applying their particular expertise to a specific component of the transaction. This division of labor allows each participant to rely upon the efforts and expertise of others in a predictable and cost-efficient manner. Since each necessarily takes action in connection with the financing, the

[8] *See* Joel S. Feldman, *The Breakdown of Securities Fraud Aiding and Abetting Liability: Can a Uniform Standard Be Resurrected?* 19 Sec. Reg. L.J. 45, 64-66 (1991).

Tenth Circuit's test of "assistance by action," applied without reference to the existence of a duty to disclose, will invariably be met with regard to each such participant, effectively reducing the test for scienter in aiding and abetting cases against such professionals to mere recklessness.

Under the majority rule, professionals who assist in such financing are subject to aiding and abetting liability under the lower recklessness standard only when they are also under a state law duty to disclose, thus providing guidance to those would-be defendants to investigate or otherwise take preventative action to avoid such liability. Now the expanding minority view, taken to an extreme by the Tenth Circuit opinion, replaces those guidelines with chaos as participants who have no disclosure duties, such as Central Bank in this case, can be liable as aiders and abettors for merely doing their jobs. In discussing primary liability under Rule 10b-5, this Court has previously established the necessity for a duty to disclose before finding silence a manipulative or deceptive device. *Chiarella v. United States*, 445 U.S. 219 (1980). For the same reasons, financing participants should be liable for aiding and abetting under a recklessness standard only when they violate some independent duty to disclose (or act).

It is imperative that this Court resolve these divergent views and reaffirm "intent" as an essential element of aider and abettor liability. Without such a requirement, financing participants will be unable to know where their responsibilities end (and others' begin), causing increased duplication of effort (and resulting cost) in such financings. The federal courts, at least in certain circuits, will increasingly become super-malpractice courts applying a recklessness standard to such professionals carrying out their responsibilities in connection with corporate and municipal financing.

In the meantime, confusion dominates among bankers, lawyers, accountants and all others who provide essential

services in corporate or municipal financing. Without uniformity of aiding and abetting elements, there is no standard by which these professionals can be guided in their conduct. Practices acceptable in one region invite liability in another. Ultimately, the uncertainty will take its toll on the transactions themselves, rendering financing either too risky or too costly to make economic sense.

CONCLUSION

This Court's guidance on these fundamental issues is gravely needed. The lower courts are chipping away at the protections afforded indenture trustees by Congress, and are moving further from agreement on standards of conduct in an essential area of national commerce. For these reasons, a writ of certiorari should issue.

Respectfully submitted this 12th day of November, 1992.

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-1315

FIRST INTERSTATE BANK OF DENVER; JACK K. NABER, on behalf of himself and all others similarly situated,

Plaintiffs-Appellants,

AND

IDS HIGH YIELD TAX-EXEMPT FUND INC.,

Plaintiff,

v.

DBLKM INC., FKA KIRCHNER MOORE & COMPANY; HANIFEN IMHOFF, INC.; COLORADO SPRINGS-STETSON HILLS PUBLIC BLDG AUTHORITY; KUTAK, ROCK & CAMPBELL,

Defendants,

AND

ROY PRING; CENTRAL BANK & TRUST COMPANY OF DENVER,

Defendants-Appellees,

v.

DBLKM INC., FKA KIRCHNER MOORE & COMPANY,

Third-Party-Plaintiff,

v.

RESOLUTION TRUST CORPORATION, as Conservator of Capitol Federal Savings and Loan Association of Denver — Capitol Federal and Savings and Loan Association of Denver; DELOITTE, HASKINS & SELLS; AMWEST DEVELOPMENT CORPORATION; AMWEST DEVELOPMENT I LIMITED PARTNERSHIP; DAVID J. POWERS; MARK O. LORDS; GEORGE JURY, SR.; RICHARD G. ZINN,

Third-Party-Defendants.

ORDER
Entered August 18, 1992

Before MCKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, and KELLY, Circuit Judges, and BRIMMER*, District Judge.

*The Honorable Clarence A. Brimmer, District Judge, United States District Court for the District of Wyoming, sitting by designation.

This matter comes on for consideration of appellee Roy Pring's petition for rehearing and appellee Central Bank of Denver's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to the panel judges and to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-1315

FIRST INTERSTATE BANK OF DENVER, N.A. AND JACK K. NABER,

Plaintiffs-Appellants,

v.

ROY I. PRING AND CENTRAL BANK AND TRUST COMPANY OF DENVER,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Colorado
(D.C. Nos. 89-F-1250 and 89-F-1806)

Miles M. Gersh (Laurie K. Rottersman, also of Gersh & Danielson; and Edwin S. Kahn of Kelly/Haglund/Garnsey & Kahn, with him on the briefs), Denver, Colorado, for Plaintiffs-Appellants.

Miles C. Cortez, Jr. (Stephen J. Hensen with him on the briefs), Cortez & Friedman, Denver, Colorado, for Defendant-Appellee Roy I. Pring.

Tucker K. Trautman (Neal S. Cohen and Polly A. Atkinson with him on the briefs), Ireland, Stapleton, Pryor & Pascoe, Denver, Colorado, for Defendant-Appellee Central Bank of Denver.

Before LOGAN and TACHA, Circuit Judges, and BRIMMER, District Judge.*

LOGAN, Circuit Judge.

* The Honorable Clarence A. Brimmer, Chief Judge, United States District Court for the District of Wyoming, sitting by designation.

Plaintiffs First Interstate Bank of Denver, N.A. and Jack K. Naber appeal from the district court's grant of summary judgment for defendants Roy I. Pring (Pring) and Central Bank of Denver (Central Bank). Plaintiffs assert claims under § 10(b) and § 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5.

I

The securities involved in this case are $11 million in bonds issued in June 1988 by the Colorado Springs-Stetson Hills Public Building Authority (the Authority).[1] Previously, in 1986, the Authority had issued $15 million in bonds. The 1986 and 1988 bonds were similar. Both were issued to reimburse the developer for the cost of public improvements in a planned residential and commercial development in Colorado Springs called Stetson Hills. Bondholders were to be repaid from assessments paid to the developer by commercial builders, or from a reserve fund. The bonds were secured by "landowner assessment liens" covering approximately 250 acres for the 1986 bond issue and approximately 272 acres for the 1988 bond issue. Under the bond covenants the land subject to the liens was required to be worth at least 160% of the bonds' outstanding principal and interest (the 160% test). Plaintiffs purchased some of the 1988 bonds, which later went into default.

The developer of Stetson Hills was AmWest Development I Limited Partnership (AmWest L.P.). The sole general partner of AmWest L.P. was AmWest Development Corporation (AmWest). Three AmWest officers were the only members of the board of directors of the Authority, including David J. Powers, AmWest's majority shareholder and chairman of

[1] The Authority defaulted early in the litigation. Plaintiffs settled claims against the underwriters of the 1988 bonds.

AmWest's board of directors, and Gregory D. Timm, AmWest's president and a member of its board.

Defendant Pring was involved in the Stetson Hills development as one of the original owners of the property, as an investor in AmWest L.P., and as a creditor, officer, and director of AmWest. Pring and his family in 1983 entered into an option agreement with AmWest to sell the 2135 acres that became the Stetson Hills property.[2] The optionee was changed from AmWest to AmWest L.P. in 1986. AmWest L.P. then partially exercised the option, purchased portions of the property, and began development. Pring and his family continued to own, subject to the option agreement, the remainder of the land within Stetson Hills.

Pring and his family formed Pring Investments, Ltd., a limited partnership, with Pring as the sole general partner; Pring Investments, Ltd. later became a twenty percent shareholder of AmWest. Pring and his wife made a loan of $1.37 million to AmWest; this loan later was converted into a limited partnership contribution in AmWest L.P. whereby Pring and his wife each came to hold 17.5% interests in AmWest L.P. Pring and his wife also made a loan of $5 million to AmWest L.P. Beginning in 1983 Pring was a vice-president[3] and director of AmWest. In February 1988, before the 1988 bonds were issued, his term as vice-president expired; in December 1988, after the 1988 bonds were issued, he resigned as director.

Central Bank served as the indenture trustee for both bond issues. In January 1988 Central Bank received an "updated" appraisal of the land securing the 1986 bonds that also included the land proposed to secure the 1988

[2] Pring and his wife owned 51% of the Stetson Hills property; other members of Pring's family owned the remaining 49%. In entering the option agreement Pring acted as attorney in fact for the other members of his family.

[3] Pring and others state that he was only an "honorary" vice-president.

bonds.[4] This appraisal was performed by Joseph Hastings, the appraiser who in 1986 had performed the original appraisal of the land securing the 1986 bonds. The updated appraisal showed land values essentially unchanged from the earlier 1986 appraisal.

Thereafter Central Bank became aware of serious concerns about the adequacy of the security for the 1986 bonds and the accuracy of the Hastings appraisal. Central Bank received from the senior underwriter of the 1986 bonds a letter that expressed concern that the 160% test was not being met. The letter also expressed concern about declining property values in Colorado Springs and the fact that they were operating on an appraisal that was over sixteen months old. The letter suggested that the Authority may have given "false or misleading certifications" of compliance with the bond covenants. I R. tab 12, ex. G at 455.[5] Subsequently, after

[4] Central Bank rejected the "updated" appraisal because it combined the property securing the 1986 bonds and that proposed to secure the 1988 bond issue. The appraiser, Joseph Hastings, later separated the appraisals.

[5] The letter closed with the following two paragraphs:

> At this date we are operating on an appraisal that is over 16 months old. In light of the declining property values in Colorado Springs and the foreclosure sales, many of which have occurred within the vicinity of the collateral, an appraisal that reflects property values similar to those utilized for the 1986 appraisal of record should be suspect and not relied on without further independent check. As Trustee, you have the authority to name an independent appraisal if you are not satisfied.
>
> It appears that the officers of the Stetson Hills Building Authority have failed to conform to the Bond Covenants to which they agreed. In the interest of the bondholders I call upon you to the [sic] enforce the covenants or Invoke the Remedies. It is our opinion that, based on your statement to us and based on the project analysis, in addition to a reserve fund deficiency the Stetson Hills Public Building Authority is not meeting either the 110% or the 160% Test.

I R. tab 12, ex. G at 456.

reviewing the updated Hastings appraisal, the 1986 underwriter wrote a second letter to Central Bank expressing serious concerns that the updated appraisal was using outdated real estate values.

Central Bank investigated. Some information contradicted the 1986 underwriter's concerns.[6] Central Bank asked its own in-house appraiser to review the Hastings updated appraisal. He did so, expressed concerns about the age of comparable sales used and the methodology used, and suggested that there be an independent review of the appraisal. Apparently Central Bank trust officer Cheryl Crandall calculated that even under the Hastings appraisal, the collateral value did not meet the 160% test. *See* I R. tab 12, ex. B at 115. In light of all the foregoing, as trustee for the 1986 bonds, in a letter dated March 22, 1988, Central Bank required "that an independent review of the appraisal be conducted by a different appraiser." I R. tab 12, ex. I. Central Bank's letter to Timm stated three reasons for requiring an independent review: (1) the comparable sales data was outdated; (2) the methodology did not consider a bulk sale in a forced liquidation context; and (3) considering the local real estate market the values appeared "unjustifiably optimistic." *Id.*

[6] Central Bank inquired as to why the values in the updated appraisal were substantially unchanged from the original appraisal despite declines in local real estate values. A representative of AmWest and the Authority, Timm, said the reason was that $10 million in improvements had been added to the property since the original appraisal. Timm wrote Central Bank's trust officer handling the 1986 bonds that the concerns expressed in the 1986 underwriter's letter were "unfounded." II Supp.R. tab 65. In addition, a different underwriter for the planned 1988 bond issue disputed several things in the 1986 underwriter's letters, including the method of calculating the 160% test and the suggestion that the Authority may have made false or misleading certifications. *See* II Supp.R. tab 72, ex. 72B.

Thereafter there was a flurry of meetings and communications between Central Bank and Timm and others.[7] The ultimate result was that Central Bank agreed to delay an independent review of the Hastings updated appraisal until the end of the year, approximately six months after the closing on the 1988 bond issue.

At least by March 1988 Pring knew that the appraisal had been questioned and that AmWest was experiencing or anticipating cash flow problems. Pring had communications with Timm in which AmWest expressed a need to acquire additional land under the option agreement. AmWest proposed that, instead of Pring receiving cash for the land purchase, Pring finance the purchase and requested that Pring agree to

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[7] On March 31 a Central Bank vice-president, Ken Buckius, met with Timm and representatives of the underwriter for the proposed 1988 bonds. Timm assured Buckius and the others that the Hastings appraisal, in fact, had considered more recent comparable sales and these had not materially affected the values. Timm also said that Hastings had used the proper methodology. Apparently Timm indicated a willingness to add approximately $2 million worth of property to the 1986 assessment lien to bring the 160% test into compliance. Timm offered to have Hastings provide a certification regarding the updated appraisal. Timm objected to Central Bank's requirement of an independent review of the Hastings updated appraisal and offered instead to have a different appraiser do a new appraisal at the end of calendar year 1988.

Central Bank's trust committee met on or about April 5 to consider Timm's proposal to delay the independent review. The committee agreed to accept the proposal. This agreement, with conditions that included adding approximately $2 million worth of property to the assessment lien, was conveyed to Timm in a letter dated April 8 from Buckius. *See* II Supp. R. tab 75. Thereafter, on May 13, a little more than one month before the closing on the 1988 bonds, Timm sent a letter to Central Bank on behalf or the Authority and the developer. The letter indicated that annual appraisals of the land securing the 1986 bonds and the proposed 1988 bonds would be provided, with the first of these to be completed within ninety days of December 1, 1988. Buckius countersigned the letter, signifying Central Bank's agreement. *See* II Supp. R. tab 240.

"cash flow arrangements." Pring refused.[8] It is undisputed that Pring stayed silent and took no action to bring what he knew to the attention of plaintiffs. From the proceeds of the 1988 bond issue Pring received almost $2 million from AmWest L.P. as payment for land purchases and as interest due on Pring's $5 million loan to AmWest L.P.

The December 1988 appraisal was begun, but the Authority refused to complete it. The 1988 bondholders were notified of the Authority's technical default. Thereafter, the Authority defaulted on payments on the 1988 bonds.

Plaintiffs allege that the 1988 bonds were sold as part of a fraudulent scheme. Plaintiffs allege that the official statement for the 1988 bonds was materially false and misleading by, inter alia, (1) representing the Hastings updated appraisal as being reliable, prudent, and correct; and (2) failing to disclose certain facts, including that Pring had refused to extend additional credit to AmWest, that Pring would receive almost $2 million from the bond proceeds, that serious concerns had been raised about the accuracy of the Hastings updated appraisal, that Central Bank had required an independent review of the appraisal, that the developer had refused to provide it, and that Central Bank later had agreed to delay the independent review until December 1988.

II

We review de novo the district court's summary judgment rulings. *Eastman Kodak Co. v. Westway Motor Freight, Inc.*,

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[8] The record includes a letter from Timm to Pring with the following handwritten notation at the bottom: "Met with [Timm]. Told him I had as much money involved in AmWest now, as I ever intend to have. I will not loan more money or forego payments due us, voluntarily." I R. tab 13, ex. G.

949 F.2d 317, 319 (10th Cir. 1991). We apply the same standard as the district court: "[s]ummary judgment is appropriate 'if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' " *Id.* (quoting Fed. R. Civ. P. 56(c)). We must view the evidence in the light most favorable to the party opposing summary judgment. *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir.), *cert. denied*, 474 U.S. 823 (1985). If a reasonable trier of fact could return a verdict for the nonmoving party, summary judgment is inappropriate. *See Windon Third Oil & Gas Drilling Partnership v. FDIC*, 805 F.2d 342, 346 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987).

We first address plaintiffs' § 20(a) claim that Pring is liable as a controlling person of the issuer through his relationship with AmWest L.P. and AmWest. The district court applied the following two-part test for a controlling person: "(1) [defendant] actively participated in overall management and operation of the controlled entity and (2) [defendant] actively participated, in some meaningful sense, in the fraud perpetrated by that entity." I R. tab 17 at 4 (citing *Lanza v. Drexel & Co.*, 479 F.2d 1277 (2d Cir. 1973) (en banc); *Harrison v. Enventure Capital Group, Inc.*, 666 F. Supp. 473, 478 (W.D.N.Y. 1987)). The district court held that Pring was not a controlling person because "plaintiffs' evidence fails to establish that Pring *actually participated in the alleged fraud* of the developer or the issuer of the [b]onds." *Id.* (emphasis added). Because it looked to plaintiffs' evidence, the district court clearly put the burden on plaintiffs to show that defendant actually participated in the alleged fraud.

We begin our analysis with the language of the statute. Section 20(a) of the Securities Exchange Act of 1934 provides:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78t(a). The statute first defines a controlling person as one "who, directly or indirectly, controls any person [who is] liable" for violations of the securities laws.[9] The final clause of the statute provides that even if a person is a controlling person, he nevertheless is not liable if he "acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." The statutory language clearly suggests a two-step analysis for § 20(a) liability: (1) determining whether the defendant is a controlling person; and (2) if so, determining whether the defendant nevertheless is entitled to the good-faith defense stated in the statute's final clause.

This court has addressed the definition of controlling person under § 20(a) in only one prior case. In *Richardson v. MacArthur*, 451 F.2d 35 (10th Cir. 1971), we stated that " '[t]he statute is remedial and is to be construed liberally. It has been interpreted as requiring only some indirect means of discipline or influence short of actual direction to hold a "controlling person" liable.' " *Id.* at 41-42 (quoting *Myzel v. Fields*, 386 F.2d 718, 738 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968)). We went on to hold that an insurance company was a controlling person over an employee who handled virtually all of the company's business in one state. *Id.* at 42. Our conclusion in *Richardson* that one can be a

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[9] In the regulations of the Securities and Exchange Commission (SEC) control is defined as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405.

controlling person despite exercising only *indirect* control follows the language of the statute.

More recently this court addressed the controlling person provision of § 15 of the Securities Act of 1933,[10] 15 U.S.C. § 77*o*, in *San Francisco-Oklahoma Petroleum Exploration Corp. v. Carstan Oil Co.*, 765 F.2d 962 (10th Cir. 1985). Although § 15 and § 20(a) are not identical, the controlling person analysis is the same. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1578 (9th Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 1621 (1991). In *Carstan Oil*, we said that a plaintiff had established a prima facie case of controlling person liability "when the [primary] violation was established, and when this defendant was shown to be a controlling person." 765 F.2d at 964. We stated that to be a controlling person one "need not have been involved in the particular transaction which became the subject of the litigation." *Id.* at 965. We also said that "[t]he defendant had the burden to demonstrate the" defense provided in the last clause of § 15. *Id.* at 964.

We believe that the allocation of the burdens for controlling person liability under § 20(a) should be the same as under § 15. A natural reading of both statutes is that a plaintiff's prima facie case consists of both a primary violation and "control" by the alleged controlling person. The final clause of both statutes ("unless the controlling person . . . "), suggests that determining the defense should follow a finding that the defendant is a controlling person.

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[10] Section 15 provides:

> Every person who . . . controls any person liable under sections 77k or 77*l* of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

15 U.S.C. § 77*o*.

Furthermore, circuit precedent is that the defendant has the burden to establish the defense under § 15, and like the Fifth Circuit "we are not aware of any reason the burden of proof should be different, especially since the sentence structure of the two statutes is similar." *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 958 n.23 (5th Cir. 1981).

Placing the burden of establishing the defense on the defendant makes sense because "there would be little reason for the controlling person provision unless it differed in some meaningful ways from the standards for noncontrolling person liability." *Id.* A number of other circuits place the burden of establishing the defense on the defendant. *E.g.*, *Hollinger*, 914 F.2d at 1575 & n.25 (citing cases from the Second, Fifth, Sixth, Seventh and District of Columbia Circuits); *Metge v. Baehler*, 762 F.2d 621, 631 (8th Cir. 1985) ("good faith and lack of participation are affirmative defenses in a controlling person action"), *cert. denied*, 474 U.S. 1057, *and cert. denied*, 474 U.S. 1072 (1986). Thus, once a plaintiff establishes a primary violation and that the defendant is a controlling person under § 20(a), the defendant then has the burden to show that he "acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." 15 U.S.C. § 78t(a).

Nowhere in the statute does it say that to be a controlling person a defendant must have actually participated in the primary violation. "[T]he statute premises liability solely on the control relationship, subject to the good faith defense. According to the statutory language, once the plaintiff establishes that the defendant is a 'controlling person,' then the defendant bears the burden of proof to show his good faith." *Hollinger*, 914 F.2d at 1575.

Thus, the language of the statute causes us to reject those decisions that may be read to require a plaintiff to show the defendant actually or culpably participated in the primary violation. *See, e.g., Sharp v. Coopers & Lybrand*, 649 F.2d

175, 185 (3d Cir. 1981) (§ 20(a) requires " 'culpable participation' in the securities violation"), *cert. denied*, 455 U.S. 938 (1982); *Carpenter v. Harris, Upham & Co.*, 594 F.2d 388, 394 (4th Cir.) (controlling person must "in some meaningful sense [be a] culpable participant[] in the acts perpetrated by the controlled person"), *cert. denied*, 444 U.S. 868 (1979); *Lanza v. Drexel & Co.*, 479 F.2d 1277, 1299 (2d Cir. 1973) (en banc) (same). Rather, the language of the statute leads us to join those circuits that hold that a plaintiff need not prove that the defendant actually or culpably participated in the primary violation. *E.g.*, *Hollinger*, 914 F.2d at 1575 ("a plaintiff is *not* required to show 'culpable participation' "); *Metge*, 762 F.2d at 631 (rejecting the more restrictive culpable participation test); *G.A. Thompson & Co.*, 636 F.2d at 958 (the statute . . . [does not] require participation in the wrongful transaction"). This conclusion is consistent with this circuit's test for a controlling person under § 15. *See Carstan Oil*, 765 F.2d at 965.

Under this allocation of the burdens, the district court erred when it placed on plaintiffs the burden regarding defendant's actual participation in the primary violation. Actual participation in the primary violation is not part of plaintiffs' prima facie case under § 20(a); rather, nonparticipation in acts inducing or constituting the primary violation, and good faith, are part of defendant's defense.

Applying the broad definition of control in the statute and the SEC regulation, we hold that the evidence viewed in the light most favorable to plaintiffs would support a finding by the trier of fact that Pring is a controlling person of the Authority for purposes of § 20(a). Pring was (1) a director of AmWest at all relevant times; (2) a vice-president of AmWest until February 1988; (3) the sole general partner of Pring Investments, Ltd., a twenty percent shareholder in AmWest; (4) with his wife, a thirty-five percent interest holder in AmWest L.P.; (5) with his wife, a $5 million creditor of AmWest L.P.; and (6) with his wife, and as attorney-in-fact

for others in his family, the owner and controller of the remaining land under the option agreement with AmWest L.P. These facts demonstrate that Pring was in a position of at least indirect control over AmWest and AmWest L.P. Because AmWest and AmWest L.P. controlled the Authority,[11] Pring's at least indirect control extended to the Authority.

Having determined that the evidence is sufficient to avoid summary judgment against plaintiffs on the issue whether Pring is a controlling person, the second step of the § 20(a) analysis is whether Pring can establish that he acted in good faith and did not participate in acts inducing the primary violation. We leave the determination of this question for the district court on remand.

III

Next we address plaintiffs' aider-and-abettor claims against Pring and Central Bank under § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. To establish aider-and-abettor liability a plaintiff must prove (1) the existence of a primary violation of the securities laws by another;[12] (2) knowledge of the primary violation by the alleged aider-and-abettor; and (3) substantial assistance by the alleged aider-and-abettor in achieving the primary violation. *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 986 (10th Cir. 1992); *accord K&S Partnership v. Continental Bank, N.A.*, 952 F.2d 971, 977 (8th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3755 (U.S. Apr. 22, 1992) (No. 91-1692); *Schatz v. Rosenberg*, 943 F.2d 485, 495 (4th Cir. 1991), *cert.*

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[11] AmWest controlled AmWest L.P. as its sole general partner. AmWest's chairman of the board, AmWest's president, and another AmWest officer constituted the entire board of directors of the Authority and thus controlled it.

[12] Neither defendant argues that plaintiffs' evidence fails to establish a material question of fact as to the existence of a primary violation, which relieves us of further inquiry on the first element.

denied, 112 S. Ct. 1475 (1992); *Ross v. Bolton*, 904 F.2d 819, 824 (2d Cir. 1990).[13]

A

Pring's motion for summary judgment was granted by the district court on the ground that "silence and inaction are not bases to establish substantial assistance absent an additional fiduciary duty to disclose." I R. tab 17 at 5. Plaintiffs do not contend that Pring owed them a duty to disclose. Rather, plaintiffs argue that Pring's silence and inaction, in

[13] Although the three elements seem to be universally accepted, some circuits state the second and third elements as a general awareness by the alleged aider-and-abettor that his or her role was part of an overall activity that was improper; and the alleged aider-and-abettor knowingly and substantially assisted the primary violation. *See Fine v. American Solar King Corp.*, 919 F.2d 290, 300 (5th Cir. 1990), *cert. dismissed*, 112 S. Ct. 576 (1991); *Schneberger v. Wheeler*, 859 F.2d 1477, 1480 (11th Cir. 1988), *cert. denied*, 490 U.S. 1091 (1989); *Moore v. Fenex, Inc.*, 809 F.2d 297, 303 (6th Cir.), *cert. denied*, 483 U.S. 1006 (1987); *Cleary v. Perfectune, Inc.*, 700 F.2d 774, 777 (1st Cir. 1983); *Investors Research Corp. v. SEC*, 628 F.2d 168, 178 (D.C. Cir.), *cert. denied*, 449 U.S. 919 (1980). The Third Circuit has used both formulations. *Compare Landy v. FDIC*, 486 F.2d 139, 162-63 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974) *with Monsen v. Consolidated Dressed Beef Co.*, 579 F.2d 793, 799 (3d Cir.), *cert. denied*, 439 U.S. 930 (1978). The Seventh Circuit considers the three elements to be additional requirements beyond a showing that the alleged aider-and-abettor committed a proscribed "manipulative or deceptive" act with the same scienter as for primary liability. *See, e.g., Schlifke v. Seafirst Corp.*, 866 F.2d 935, 947 (7th Cir. 1989). Although the Ninth Circuit generally states the elements as in the text, a recent case expressly includes in the second element the alleged aider-and-abettor's reckless disregard of the wrong and his or her role in furthering it. *See Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991).

light of what he knew about AmWest and the appraisal,[14] did constitute substantial assistance because Pring had actual intent to aid the primary violation.

When there is no duty to disclose, it is sometimes stated absolutely that silence or inaction cannot be the basis for aider-and-abettor liability. *E.g., Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 495-96 (7th Cir. 1986) ("When the nature of the offense is a failure to 'blow the whistle', the defendant must have a *duty* to blow the whistle."). The weight of authority, however, is that even absent a duty to disclose, silence and inaction can be substantial assistance for aider-and-abettor liability *provided* the defendant consciously intended to assist the primary violation. *E.g., Schneberger v. Wheeler*, 859 F.2d 1477, 1480 (11th Cir. 1988), *cert. denied*, 490 U.S. 1091 (1989); *Moore v. Fenex, Inc.*, 809 F.2d 297, 303-04 (6th Cir.), *cert. denied*, 483 U.S. 1006 (1987); *Monsen v. Consolidated Dressed Beef Co.*, 579 F.2d 793, 800 (3d Cir.), *cert. denied*, 439 U.S. 930 (1978); *Woodward v. Metro Bank*, 522 F.2d 84, 97 (5th Cir. 1975). For example, in *Metge* the court said that

> in the absence of a duty to act or disclose, an aider-abettor case predicated on inaction of the secondary party must meet a high standard of intent. As applied here, *Woodward* and *Monsen* require that the aider-abettor's inaction be accompanied by actual knowledge of the underlying fraud and intent to aid and abet a wrongful act. The requisite intent

[14] The record makes clear that Pring knew that AmWest needed to buy additional land to use as collateral. Pring's own admissions support plaintiffs' contentions that he was aware of concerns regarding the appraisal and that an independent review would be delayed until after the bonds were issued. *See* I R. tab 13, ex. A at 114-16. Pring does not challenge the existence of a material question of fact as to the second element of aider-and-abettor liability, i.e., scienter. However, regarding the third element of substantial assistance, we assume that Pring does controvert the existence of conscious intent to assist the primary violation.

> and knowledge may be shown by circumstantial evidence.

762 F.2d at 625. In evaluating whether silence was accompanied by a conscious or actual intent to assist the primary violation, courts have examined whether the alleged aider-and-abettor benefitted from such silence. *See, e.g., K&S Partnership*, 952 F.2 at 978; *Metge*, 762 F.2d at 629; *cf. DiLeo v. Ernst & Young*, 901 F.2d 624, 629 (7th Cir.) (on the issue of defendant's mental state, ask if "the defendant has thrown in his lot with the primary violators," e.g., did defendant have anything to gain (quoting *Barker*, 797 F.2d at 497)), *cert. denied*, 111 S. Ct. 347 (1990); *Barker*, 797 F.2d at 497 ("If the plaintiff does not have direct evidence of scienter, the court should ask whether the fraud (or cover-up) was in the interest of the defendants."). This analysis is appropriate in this case.

Plaintiffs' evidence establishes that Pring had a substantial personal stake in the 1988 bond issue. Pring knew that he and his family would receive a substantial payment from AmWest L.P. from the proceeds of the 1988 bond sale.[15] Based on the record, a jury could find that Pring had a strong

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[15] The February 24, 1988 letter from Timm to Pring indicates AmWest's plan to use $725,000 in "Funds available from the Bond Issue" to purchase land from the Pring family. I R. tab 13, ex. E at 3. In his deposition, Pring acknowledged a May 17, 1988 letter from Timm that included "[a] summary of the bond closing payments to the Pring shareholders and limited partners." I R. tab 13, ex. A at 130. Furthermore, in a letter dated June 15, 1988, the day before the bond closing, AmWest gave Pring "a detailed listing of the amounts which AmWest is arranging to remit to you from the proceeds of our June 16th bonds closing," which indicated a grand total payment of $1,965,932.08. I R. tab 13, ex. I. Although Pring's answers were somewhat hedged on the question of where the funds came from, *see* I R. tab 13, ex. A at 136-38, he admitted that the notation "Re-closing of 6/16/88" on the June 15 letter was in his handwriting, *id.* at 136, and the trier of fact could conclude that he in fact did know that the source of funds was the 1988 bond issue.

motivation to stay silent despite what he knew. Pring's possible motivation is in sharp contrast to the lesser motivations courts have held insufficient to show conscious intent. *See, e.g., DiLeo*, 901 F.2d at 629 (accountant's fees for two years of audits); *National Union Fire Ins. Co. v. Turtur*, 892 F.2d 199, 207 (2d Cir. 1989) (insurance company's premium for a guarantee). Viewing the evidence in the light most favorable to plaintiffs, the nonmoving parties on summary judgment, the trier of fact reasonably could conclude that Pring had a conscious intent to assist the alleged primary violation and that had Pring not stayed silent plaintiffs would not have suffered losses. Thus, there was a genuine issue of material fact as to the third element of substantial assistance and summary judgment on plaintiff's aiding-and-abetting claim against Pring was inappropriate.

B

Central Bank's motion for summary judgment was granted by the district court on the ground that plaintiffs failed to raise a genuine issue as to the element of scienter. The district court determined that plaintiffs had not established a duty to disclose by Central Bank. Then, citing only *National Union Fire Ins. Co. v. Eaton*, 701 F. Supp. 1031 (S.D.N.Y. 1988), the district court concluded that without a duty to disclose, recklessness does not satisfy the scienter requirement for aider-and-abettor liability.

Central Bank argues that recklessness is not sufficient scienter because it had no duty to disclose. Without such a duty, Central Bank asserts, the required scienter is conscious intent, citing *Woodward, Ross, Monsen,* and *IIT v. Cornfeld*, 619 F.2d 909 (2d Cir. 1980). Central Bank argues that it did not have conscious intent to assist the primary violation, and that in any event it did not substantially assist the primary violation. Plaintiffs' primary argument is that even without

a duty to disclose, recklessness is sufficient scienter. Plaintiffs contend that Central Bank acted recklessly by affirmatively agreeing to delay the independent review of the Hastings updated appraisal. Plaintiffs also assert that Central Bank did not provide substantial assistance to the primary violation.

We agree with Central Bank's argument and the district court's conclusion that Central Bank owed plaintiffs no duty to disclose. An indenture trustee's duties are strictly defined and limited to the terms of the indenture. *See, e.g., Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 71 (2d Cir. 1988). The Trust Indenture Act of 1939 expressly provides that "the indenture trustee shall not be liable except for the performance of such duties as are specifically set out in such indenture." 15 U.S.C. § 77*ooo*(a)(1). Section 9.01(a) of the indenture at issue here provided that the trustee at relevant times "undertakes to perform such duties and only such duties as are specifically set forth in this [i]ndenture." II Supp. R. 53.

But the lack of a duty to disclose is not dispositive in this case. As Central Bank concedes, the Trust Indenture Act of 1939 "does not affect 'the rights, obligations, duties [, or] liabilities of any person' under the federal securities laws." Answer Brief of Defendant-Appellee Central Bank at 29 (quoting 15 U.S.C. § 77zzz). It is clear that in a proper case it is possible for an indenture trustee to be held liable as an aider-and-abettor. *See Cronin*, 619 F.2d at 861-862 (reversing grant of summary judgment for defendant indenture trustees and remanding for further discovery despite the district court's belief "that the [trustees'] duties were limited by the terms of their indenture agreements"); *Lewis v. Marine Midland Grace Trust Co.*, 63 F.R.D. 39, 45-46 (S.D.N.Y. 1973) (denying defendants' motions to dismiss and indicating that if the elements of aiding-and-abetting liability are established the defendant indenture trustee can be liable); *cf. Ross v. Bank South, N.A.*, 837 F.2d 980, 1003 (11th Cir.) (implying

that an indenture trustee could be liable if plaintiffs had *evidence*, as opposed to just conclusory allegations, that the trustee had knowledge of the fraud), *vacated*, 848 F.2d 1132 (11th Cir. 1988), *on reh'g*, 885 F.2d 723 (11th Cir. 1989) (en banc), *cert. denied*, 495 U.S. 905 (1990). Thus, Central Bank is not immune from liability if plaintiffs can prove the elements of aider-and-abettor liability.

The established rule is that recklessness is sufficient scienter for a primary violation of § 10(b) and Rule 10b-5. *E.g., Hackbart v. Holmes*, 675 F.2d 1114, 1117 (10th Cir. 1982); *accord, e.g., Van Dyke v. Coburn Enters., Inc.*, 873 F.2d 1094, 1100 (8th Cir. 1989) ("[t]he majority rule in the Courts of Appeals is that recklessness satisfies th[e] scienter requirement"; citing cases from the Second, Third, Fifth, Seventh, Ninth, Eleventh and District of Columbia Circuits).[16] The Seventh Circuit has said that aiding-and-abetting liability requires "the same mental state [as] required for primary liability." *Barker*, 797 F.2d at 495. This circuit, in at least three cases involving claims of both primary and aiding-and-abetting liability, has indicated that recklessness is sufficient scienter without distinguishing between the claims. *See C.E. Carlson, Inc. v. SEC*, 859 F.2d 1429, 1435 (10th Cir. 1988); *Cronin v. Midwestern Okla. Dev. Auth.*, 619 F.2d 856, 862 (10th Cir. 1980); *Edward J. Mawod & Co. v. SEC*, 591 F.2d 588, 595-96 (10th Cir. 1979).

Several courts expressly have held that recklessness satisfies the scienter requirement for aiding-and-abetting liability. *See, e.g., Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991) (including recklessness in the scienter element and citing cases); *FDIC v. First Interstate Bank*, 885

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[16] Recklessness satisfied the scienter requirement for common law fraud. *See, e.g., Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1024 (6th Cir. 1979). Although negligence is not sufficient, the Supreme Court has left open the question of whether recklessness is sufficient scienter for a violation of § 10(b). *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 & n.12 (1976).

F.2d 423, 432-33 (8th Cir. 1989) (holding recklessness sufficient in a case predicated on action); *Dirks v. SEC*, 681 F.2d 824, 844-45 (D.C. Cir. 1982) (opinion of Wright, J.) (Two leading aiding-and-abetting cases "do not imply that 'knowingly * * * assist' or 'general awareness' require a higher standard for aiding or abetting liability than the general scienter standard required by *Ernst & Ernst*. Recklessness would have been enough." (footnote omitted)), *rev'd on other grounds*, 463 U.S. 646 (1983). This court has said that "a proper showing of reckless conduct *might* satisfy [the] state of mind requirement" for aiding-and-abetting liability. *Decker v. SEC*, 631 F.2d 1380, 1388 & n.16 (10th Cir. 1980) (aiding-and-abetting claim under 15 U.S.C. § 17(e)(1)) (emphasis added).

Some courts, however, have indicated that recklessness is not sufficient scienter for aiding-and-abetting liability unless the defendant had a fiduciary duty. *See, e.g., Edwards & Hanly v. Wells Fargo Sec. Clearance Corp.*, 602 F.2d 478, 484 (2d Cir. 1979) ("We have not used the 'recklessness' standard when money damages are claimed in an aiding and abetting context, except on the basis of a breach of fiduciary duty."), *cert. denied*, 444 U.S. 1045 (1980).[17] *See generally* William H. Kuehnle, *Secondary Liability Under the Federal Securities Laws — Aiding and Abetting, Conspiracy, Controlling Person, and Agency: Common-Law Principles and the Statutory Scheme*, 14 J. Corp. L. 313, 327-30 (1989) (stating that while some courts have adopted recklessness as a general standard for aiding-and-abetting liability, many courts use a recklessness standard only in certain circumstances, including where there is a fiduciary duty); Don J. McDermett, Jr., Note, *Liability for Aiding and Abetting Violations of Rule 10b-5: The*

[17] We have quoted language from the Second Circuit that even if a defendant is reckless, "absent a fiduciary duty owing from [defendant] to [plaintiff] there is no aiding and abetting liability." *Farlow*, 956 F.2d at 987 (quoting *Ross*, 904 F.2d at 824). This quotation, however, was made during the course of a lengthy discussion of various cases, and *Farlow* did not adopt this view as the law of this circuit.

Recklessness Standard in Civil Damage Actions, 62 Tex. L. Rev. 1087, 1103-08 (1984) (same, finding the fiduciary duty requirement particularly clear in the Second Circuit, but indicating that some Second Circuit opinions have either hesitated to accept the requirement or have gone to great lengths to find some duty).

In this case Central Bank has mischaracterized plaintiffs' claim as one alleging that Central Bank improperly did not disclose certain facts. It is true that the primary violation alleged by plaintiffs includes the nondisclosure in the official statement of certain facts. It is also true that plaintiffs' aiding-and-abetting claim against Pring is based on the allegation that his silence and nondisclosure assisted the primary violation. But plaintiffs' claim against Central Bank is different. Plaintiffs allege that Central Bank assisted the primary violation by *affirmative action*, specifically by affirmatively agreeing to delay the independent review of the Hastings appraisal.[18]

Thus we arrive at the issue before us: when an alleged aider-and-abettor owes no duty to plaintiffs, but takes affirmative action that assists the primary violation, does recklessness satisfy the scienter requirement for aiding-and-abetting liability? In light of the affirmative nature of Central Bank's alleged assistance, the nondisclosure cases relied

[18] In the district court plaintiffs argued that Central Bank both affirmatively acted to delay the independent review of the Hastings appraisal and failed to alert plaintiffs of the risks related to the Hastings appraisal. I R. tab 1 at 13-14 (complaint); I R. tab 12 at 1 (brief opposing motion for summary judgment (emphasizing "affirmative steps")). The district court's order only deals with plaintiffs' claim of affirmative acts. Furthermore, on appeal, plaintiffs appear to have abandoned the argument that Central Bank improperly was silent. *See* Reply Brief for the Plaintiffs-Appellants at 23 ("Central characterizes plaintiffs' showing as nothing more than an argument that Central passively failed to 'blow the whistle' on the Hastings appraisal. Central says it did not have a duty to be a whistle blower. But this is distinctly not plaintiffs' argument.").

on by Central Bank are inapposite. Central Bank asserts that "[t]here is simply no decision in this Circuit or any other which imposes aider and abettor liability upon a finding of recklessness where there is not also a breach of a duty to disclose." Answer Brief of Defendant-Appellee Central Bank at 22. However, such cases do exist, and they are the ones that are relevant here.

The Ninth Circuit's recent opinion in *Levine* is particularly enlightening. In that case the court addressed the potential liability of a trust company and a bank as aiders-and-abettors of an allegedly fraudulent diamond investment scheme. 950 F.2d at 1483-85. The trust company allegedly assisted the primary violation by, inter alia, allowing its name to be used in promotional materials, accepting telephone inquiries from investors, and issuing confirmations to investors. *Id.* at 1484. The bank allegedly assisted the primary violation by, inter alia, sending an officer to certain seminars, coordinating the handling of investor inquiries, making certain representations to investors, and considering but apparently not making an amendment to a deposit agreement to conform to certain representations. *Id.* at 1485. Of course, the facts in the instant case are different. Importantly, however, the *Levine* court considered the case before it as one based on assistance by action and for that reason expressly found irrelevant the question whether the alleged aiders-and-abettors had a duty to disclose. *See id.* at 1484-85 nn.4-5. Further, in holding that the plaintiff's allegations adequately stated claims for aiding-and-abetting liability, the court applied a recklessness standard. *See id.* at 1484 (the trust company's actions "may well have been reckless — that is, highly unreasonable and constituting an extreme departure from standards of ordinary care"); *id.* at 1485 (plaintiff "could prove facts indicating [the bank's] reckless disregard, if not actual knowledge, of both [the primary violations] and the bank's role in the violations").

The Eighth Circuit also has applied a recklessness standard in an aiding-and-abetting case the court described as one "predicated on action." *First Interstate Bank*, 885 F.2d at 429, 432-33 (applying *Metge*, 762 F.2d at 621, to a case of common law aiding-and-abetting). In *First Interstate Bank*, despite various warnings and significant concerns about a particular customer, the defendant bank assisted the customer's fraud by processing accounts, handling wire transfers, and reversing a decision to require the customer to close his accounts. *See id.* at 424-28. The jury found the bank liable as an aider-and-abettor. *See id.* at 428. In affirming the denial of a motion for judgment n.o.v., the court said the "evidence supports an inference that [the defendant bank], with potential profits in mind, recklessly chose to continue its relationship with [the primary violator]." *Id.* at 432. The defendant bank made the argument — essentially the same argument put forth by Central Bank — that it had no fiduciary duty and therefore it could not be held liable for inaction without a showing of more than recklessness. *See id.* at 432-33. The Eighth Circuit rejected this argument, noting that this was "a case predicated on action" and stating that "[i]t need not be shown, therefore, that [the defendant bank] consciously intended to defraud the [plaintiff]." *Id.* at 433.

The cases discussed above reject the idea that the scienter element for aiding-and-abetting liability cannot be satisfied by recklessness without a duty to disclose. We also reject that view. We hold that in an aiding-and-abetting case based on assistance by action, the scienter element is satisfied by recklessness.

"[R]eckless behavior is conduct that is 'an extreme departure from the standards of ordinary care, and which presents a danger . . . that is either known to the defendant or is so obvious that the actor must have been aware of it.'" *Hackbart*, 675 F.2d at 1118 (citation omitted); *accord, e.g.*, *Hollinger*, 914 F.2d at 1569. We turn to the facts of this case, viewed in the light most favorable to plaintiffs, to determine

whether the trier of fact reasonably could conclude that Central Bank was reckless when it agreed to delay the independent review of the Hastings updated appraisal.

Central Bank appears to argue that this was simply a "transaction[] constituting the daily grist of the mill." *Woodward*, 522 F.2d at 97. But the evidence supports the inference that this was not an ordinary transaction. Central Bank's own trust officer and others characterized this as a complicated transaction. *See* I R. tab 12, ex. G at 454; I R. tab 12, ex. B at 161. Central Bank's in-house appraiser indicated that this was the only situation in which he had been asked to review an appraisal of collateral for a bond issue. *See* I R. tab 12, ex. J at 46. Before the agreement to delay the independent review, one of Central Bank's vice-presidents assumed responsibility for the transaction from the trust officer who had been handling it. *See* I R. tab 12, ex. B at 161. Nothing in the record suggests that in any other situation had Central Bank first decided to require an independent review of an appraisal for a bond issue and later agreed to delay it.

Central Bank argues that the agreement to delay the independent review was justified in part because it was entitled to rely on the certifications provided by the Authority and Hastings. The indenture does contain provisions to that effect. But the issue is whether agreeing to delay the independent review was an extreme departure from the standards of ordinary care that carried a known or obvious danger, not whether it was a breach of authority under the indenture. As to Central Bank's reliance on the Authority's certifications, it is significant that Central Bank previously had been warned expressly that the Authority may have "given false or misleading certifications." I R. tab 12, ex. G at 455. As to Hasting's certification, the fact that Central Bank apparently prepared a draft of it, *see* II Supp. R. tab 75, and it was not executed until June 16 (the date of the bond closing),

suggest that it was given little weight in Central Bank's decision to agree to delay the independent review.

Before the agreement to delay the independent review, it is undisputed that Central Bank knew that serious concerns had been raised about the accuracy of the Hastings updated appraisal. Central Bank's own action, in originally requiring an independent review, demonstrates that it believed that those concerns were credible. As a condition to postponing the independent review of the Hastings updated appraisal, Central Bank did require that approximately $2 million worth of additional property be added to the security for the 1986 bond issue. This may have alleviated concerns about insufficient security for the 1986 bonds, but it did nothing to address the danger that the collateral was deficient for the 1988 bonds. Although the bank's duty at that time was only with respect to the 1986 bond issue, the bank was preparing to be the indenture trustee for the 1988 bond issue. Central Bank knew that the sale of the 1988 bonds was imminent, and apparently knew that the Hastings updated appraisal was being relied on to value the collateral for the 1988 bonds. Under these circumstances, the bank's knowledge of the alleged inadequacies of the Hastings updated appraisal could support a finding of extreme departure from the standards of ordinary care.

The above are all of the facts we can discern from the record before the court for summary judgment. Although a trial might shed more light on the reasons for Central Bank's actions, and that might justify the bank's exoneration, on the basis of the record before us we hold that plaintiffs have established a genuine issue of material fact as to the scienter element of aiding-and-abetting liability.[19]

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[19] In addition to arguing that Central Bank was reckless, plaintiffs argue alternatively that Central Bank had actual knowledge of the primary violation. Because of our disposition, we need not reach this issue.

The third element of substantial assistance was not addressed by the district court.[20] Plaintiffs argue that Central Bank's agreement to delay an independent review of the Hastings appraisal constituted substantial assistance to the primary violation. Central Bank argues that although it had the *right* to require an independent review it was not required to do so under the indenture. This simply establishes that Central Bank did not breach a duty under the indenture. On the separate question of whether Central Bank rendered substantial assistance to the primary violation, which allegedly included representing the Hastings appraisal as accurate, the trier of fact reasonably could conclude that had Central Bank adhered to its original demand for an independent review and not agreed to delay it, the depleted collateral would have been discovered and plaintiffs' losses avoided. Thus, we hold that plaintiffs have raised a genuine issue of material fact as to the element of substantial assistance, and the district court's grant of summary judgment for Central Bank was inappropriate.

REVERSED and REMANDED for proceedings consistent herewith.

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[20] Central Bank argues that plaintiffs "absolutely ignored" the element of substantial assistance in the district court. Although plaintiffs' brief opposing summary judgment focused on the scienter element it cited the substantial assistance element and specifically referred to the agreement to delay the independent review of the appraisal. Any suggestion that plaintiffs failed to preserve the substantial assistance issue is without merit.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-F-1250 and
Civil Action No. 89-F-1806

FIRST INTERSTATE BANK OF DENVER, N.A., and
JACK K. NABER,

Plaintiffs,

vs.

KIRCHNER MOORE & COMPANY, d/b/a DBLKM Inc.;
HANIFEN IMHOFF, INC.;
THE COLORADO SPRINGS-STETSON HILLS PUBLIC BUILDING AUTHORITY;
ROY I. PRING; and
THE CENTRAL BANK & TRUST COMPANY OF DENVER,

Defendants,

and

KIRCHNER MOORE & COMPANY, d/b/a DBLKM Inc.,

Third-Party Plaintiff,

vs.

RESOLUTION TRUST CORPORATION, as Conservator for Capitol Federal Savings and Loan Association of Denver;
AMWEST DEVELOPMENT CORP.;
AMWEST DEVELOPMENT I LIMITED PARTNERSHIP; and

Third-Party Defendants.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Sherman G. Finesilver, Chief Judge

THIS MATTER comes before the court on various motions of parties. This litigation arises from the alleged fraudulent issuance and sale of bonds in violation of federal securities law. Plaintiffs bring this cause of action pursuant to § 10(b) of the Securities Exchange Act of 1934 and rules promulgated thereunder by the Securities Exchange Commission. 15 U.S.C. § 78a *et seq.* Jurisdiction arises pursuant to 28 U.S.C. § 1331. The factual and procedural background of this litigation has been outlined in prior orders and will not be repeated here.

Three motions for summary judgment have been filed pursuant to Fed.R.Civ.P. 56. Defendant Roy I. Pring moves for summary judgment of claims of plaintiffs First Interstate Bank of Denver, N.A. and Jack K. Naber. Defendant Central Bank & Trust Company of Denver moves for summary judgment of plaintiffs' claim. Third-party defendant Resolution Trust Corporation as Conservator for Capitol Federal Savings and Loan Association of Denver moves for summary judgment of third-party claim of defendant and third-party plaintiff Kirchner Moore & Company.

I.

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Willner v. Budig*, 848 F.2d 1032, 1033-34 (10th Cir.), *cert. denied*, __U.S.__, 109 S.Ct. 840 (1989). The plain language of Rule 56(c) mandates the entry of summary judgment against the party who fails to make a showing that is sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the party opposing the motion, and resolve all doubts in favor of the existence of triable issues of fact. *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir.), *cert. denied*, 474 U.S. 823 (1985); *Ross v. Hilltop Rehabilitation Hosp.*, 676 F.Supp. 1528 (D. Colo. 1987).

In *Celotex v. Catrett*, 477 U.S. 317 (1986), the Supreme Court held that the language of Rule 56(c) does *not* require the moving party to show an *absence* of issues of material fact in order to be awarded summary judgment. *Id.*, 477 U.S. at 322. The movant merely has the initial responsibility of informing the court of the basis for the motion, and identifying those portions of the record it believes show a lack of genuine issue. *Id.*, 477 U.S. at 323. This burden is discharged merely by pointing out to the court there is an absence of evidence to support the non-movant's case. *Id.*, 477 U.S. at 325. On the other hand, the non-movant has the burden of showing that there *are* issues of material fact to be determined. *Id.*, 477 U.S. at 322-23. *See* Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court, 116 F.R.D. 183 (1987).*

II.

Defendant Roy I. Pring ("Pring") moves for summary judgment of claims of plaintiffs First Interstate Bank of Denver, N.A. and Jack K. Naber (the "plaintiffs"). Plaintiffs contend Pring is (1) primarily liable under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission and is (2) secondarily liable as (a) participant in conspiracy to commit fraud under Rule 10b-5; (b) controlling person under § 20 of the Securities Exchange Act; and (c) aider and abettor under Rule 10b-5.

Plaintiffs fail to oppose Pring's motion as to primary liability and as to conspiracy liability.

In order to establish liability of Pring as controlling person pursuant to § 20 of the Securities Exchange Act plaintiffs must prove the purported controlling person (1) actively participated in overall management and operation of the controlled entity and (2) actively participated, in some meaningful sense, in the fraud perpetrated by that entity. *Harrison v. Enventure Capital Group, Inc.*, 666 F.Supp. 473, 478 (W.D.N.Y. 1987); *Lanza v. Drexel & Co.*, 479 F.2d 1277 (2d Cir. 1973) (*en banc*). Pring correctly states plaintiffs must offer evidence that Pring controlled the developer, AmWest I Development Limited Partnership ("AmWest"), and participated in a fraud committed by the developer or the issuer of the Bonds, the Colorado Springs-Stetson Hills Public Building Authority. In opposition plaintiffs state Pring owned or controlled the collateral property, was a substantial interest holder in AmWest and was a principal creditor of AmWest. Pring was a creditor of AmWest. His last loan to AmWest was made in 1985. Pring was no longer an officer of AmWest when the Official Statement was prepared or when the Bonds were issued. Even taken as true plaintiffs' evidence fails to establish that Pring actually participated in the alleged fraud of the developer or the issuer of the Bonds. *Seattle-First National Bank v. Carlstedt*, 678 F.Supp. 1543 (W.D.Okla. 1987). There is no genuine issue of material fact in regard to active participation in the alleged fraud in order to establish controlling person liability.

In order to establish aider and abettor liability under Rule 10b-5 plaintiff must prove (1) primary violation of Rule 10b-5 by another; (2) knowledge of the violation by alleged aider and abettor; and (3) substantial assistance by the aider and abettor. *Feldman v. Pioneer Petroleum, Inc.*, 606 F.Supp. 916 (W.D.Okla. 1985), *aff'd*, 813 F.2d 296 (10th Cir. 1987); *Johnson v. Chilcott*, 658 F.Supp. 1213 (D.Colo. 1987). Plaintiffs contend Pring's silence and inaction in the

face of undervalued collateral constitute substantial assistance to establish liability as aider and abettor. However silence and inaction are not bases to establish substantial assistance absent an additional fiduciary duty to disclose. *Dirks v. SEC*, 463 U.S. 646, 653-64 (1983); *Chiarella v. United States*, 445 U.S. 222, 227-35 (1980). Plaintiffs fail to offer persuasive authority or evidence to establish that Pring breached any fiduciary duty owed plaintiffs. Plaintiffs fail to establish a material fact as to the third element necessary for aider and abettor liability.

III.

Defendant Central Bank & Trust Company of Denver ("CBD") moves for summary judgment of plaintiffs' claim against CBD. Plaintiffs contend Central Bank is secondarily liable under Section 10(b) of the Securities Exchange Act and Rule 10b-5 of the Securities Exchange Commission as aider and abettor. The elements of aider and abettor liability are identified above.

Plaintiffs allege CBD knowingly took affirmative steps to postpone review of the so-called Hastings appraisal, a key element in the alleged scheme to defraud. Plaintiffs contend this was reckless behavior by CBD, thereby satisfying the knowledge or scienter requirement of aider and abettor liability. However the scienter requirement may not be satisfied by showing recklessness absent an additional duty to disclose. *National Union Fire Ins. Co. of Pittsburgh v. Eaton*, 701 F.Supp. 1031 (S.D.N.Y. 1988). Plaintiffs do not raise a genuine issue of material fact as to CBD's knowledge of fraud allegedly perpetrated by AmWest or as to additional duty to disclose owed by CBD.

IV.

Third-party defendant Resolution Trust Corporation ("RTC") as Conservator for Capitol Federal Savings and

Loan Association of Denver ("Capitol Federal") moves for summary judgment of third-party claim of defendant and third-party plaintiff Kirchner Moore & Company ("KMC"). KMC brings a claim for contribution, based on Capitol Federal's liability under § 10b and Rule 10b-5 as an aider and abettor. The elements of aider and abettor liability are identified above. KMC has not presented evidence to establish Capitol Federal, at the time it lent an additional $1.5 million to AmWest, had any knowledge of fraud allegedly committed by AmWest or any other entity. The scienter requirement for aider and abettor liability may not be satisfied by showing recklessness absent an additional duty to disclose. *National Union Fire Ins. Co. of Pittsburgh v. Eaton,* 701 F.Supp. 1031 (S.D.N.Y. 1988). KMC does not raise a genuine issue of material fact in regard to Capitol Federal's knowledge of the alleged fraud or as to a duty to disclose.

V.

Defendants Central Bank, Hanifen Imhoff, Inc. and Roy I. Pring have filed a motion to compel depositions of plaintiffs' expert witnesses. However the deadline for completion of discovery has passed. The motion to compel is denied.

VI.

ACCORDINGLY IT IS ORDERED that the motion of Roy I. Pring for leave to file reply brief in excess of ten pages, filed June 20, 1990, is GRANTED. The reply brief is deemed filed through. Plaintiffs' motion for leave to submit supplemental memorandum respecting Pring's motion for summary judgment, filed June 21, 1990, is GRANTED. The supplemental memorandum is deemed filed through.

IT IS FURTHER ORDERED that the motion of RTC for leave to file reply brief in excess of ten pages, filed June 20, 1990, is GRANTED. The reply brief is deemed filed through.

IT IS FURTHER ORDERED that the motion for summary judgment of Roy I. Pring pursuant to Fed.R.Civ.P. 56 is GRANTED. The Clerk of the Court is DIRECTED to enter judgment in favor of defendant Roy I. Pring and against plaintiffs First Interstate Bank of Denver, N.A. and Jack K. Naber.

IT IS FURTHER ORDERED that the motion for summary judgment of Central Bank & Trust Company of Denver pursuant to Fed.R.Civ.P 56 is GRANTED. The Clerk of the Court is DIRECTED to enter judgment in favor of Central Bank & Trust Company of Denver and against plaintiffs First Interstate Bank of Denver, N.A. and Jack K. Naber.

IT IS FURTHER ORDERED that the motion for summary judgment of Resolution Trust Corporation as Conservator for Capitol Federal Savings and Loan Association of Denver pursuant to Fed.R.Civ.P. 56 is GRANTED. The Clerk of the Court is DIRECTED to enter judgment in favor of third-party defendant Resolution Trust Corporation as Conservator for Capitol Federal Savings and Loan Association of Denver and against defendant and third-party plaintiff Kirchner Moore & Company.

IT IS FURTHER ORDERED that the motion to compel of defendants Central Bank, Hanifen Imhoff, Inc. and Roy I. Pring, filed June 21, 1990, is DENIED.

IT IS FURTHER ORDERED that remaining parties are DIRECTED to file a Second Amended Pretrial Order on or before noon on July 5, 1990. Counsel for plaintiffs are DIRECTED to take the lead in preparation of the Pretrial Order. All counsel are DIRECTED to ensure that the Pretrial Order accurately reflects all remaining viable claims of parties and is complete in all respects.

The court strongly discourages pretrial motions. Evidentiary matters will be addressed at trial.

The court is in receipt of KMC's Notice of Name Change, filed June 25, 1990. The caption shall reflect Kirchner Moore & Company is now doing business as DBLKM Inc.

Done this 26th day of June 1990 at Denver, Colorado.

By the Court:

/s/ Sherman G. Finesilver

Sherman G. Finesilver,
Chief Judge
United States District Court

Code of Federal Regulations, Title 17 (1989)

§ 240.10b-5. Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

U.S. Code, Title 15 (1988)

§ 77ooo. Duties and responsibility of trustee.

(a) Duties prior to default.

The indenture to be qualified may provide that, prior to default (as such term is defined in such indenture)—

(1) the indenture trustee shall not be liable except for the performance of such duties as are specifically set out in such indenture; and

(2) the indenture trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, in the absence of bad faith on the part of such trustee, upon certificates or opinions conforming to the requirements of the indenture;

but such indenture shall contain provisions requiring the indenture trustee to examine the evidence furnished to it pursuant to section 77nnn of this title to determine whether or not such evidence conforms to the requirements of the indenture.

(b) Notice of defaults.

The indenture to be qualified shall contain provisions requiring the indenture trustee to give to the indenture security holders, in the manner and to the extent provided in subsection (c) of section 77mmm of this title, notice of all defaults known to the trustee, within ninety days after the occurrence thereof: *Provided*, That such indenture may provide that, except in the case of default in the payment of the principal of or interest on any indenture security, or in the payment of any sinking or purchase fund installment, the trustee shall be protected in withholding such notice if and so long as the board of directors, the executive committee, or a trust committee of directors and/or responsible officers, of the trustee in good faith determine that the withholding of such notice is in the interests of the indenture security holders.

(c) Duties of trustee in case of default

The indenture to be qualified shall contain provisions requiring the indenture trustee to exercise in case of default (as such term is defined in such indenture) such of the rights and powers vested in it by such indenture, and to use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

(d) Responsibility of trustee

The indenture to be qualified shall not contain any provisions relieving the indenture trustee from liability for its

own negligent action, its own negligent failure to act, or its own willful misconduct, except that—

(1) such indenture may contain the provisions authorized by paragraphs (1) and (2) of subsection (a) of this section;

(2) such indenture may contain provisions protecting the indenture trustee from liability for any error of judgment made in good faith by a responsible officer or officers of such trustee, unless it shall be proved that such trustee was negligent in ascertaining the pertinent facts; and

(3) such indenture may contain provisions protecting the indenture trustee with respect to any action taken or omitted to be taken by it in good faith in accordance with the direction of the holders of not less than a majority in principal amount of the indenture securities at the time outstanding (determined as provided in subsection (a) of section 77ppp of this title) relating to the time, method, and place of conducting any proceeding for any remedy available to such trustee, or exercising any trust or power conferred upon such trustee, under such indenture.

(e) Undertaking for costs

The indenture to be qualified may contain provisions to the effect that all parties thereto, including the indenture security holders, agree that the court may in its discretion require, in any suit for the enforcement of any right or remedy under such indenture, or in any suit against the trustee for any action taken or omitted by it as trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorney's fees, against any party litigant in such suit, having the due regard to the merits and good faith of the claims or defenses made by such party litigant; *Provided*, That the provisions of this

subsection shall not apply to any suit instituted by such trustee, to any suit instituted by any indenture security holder, or group of indenture security holders, holding in the aggregate more than 10 per centum in principal amount of the indenture securities outstanding, or to any suit instituted by any indenture security holder for the enforcement of the payment of the principal of or interest on any indenture security, on or after the respective due dates expressed in such indenture security.

THE COLORADO SPRINGS-STETSON HILLS
PUBLIC BUILDING AUTHORITY,

A Nonprofit Corporation Organized Under the
Laws of the State of Colorado,

AND

THE CENTRAL BANK AND TRUST COMPANY OF DENVER,
D/B/A CENTRAL BANK OF DENVER,
A BANKING CORPORATION,
as trustee

INDENTURE OF TRUST

Dated as of May 15, 1988

ARTICLE IX
THE TRUSTEE

Section 9.01. *Acceptance of Trusts.* The Trustee hereby accepts the trusts imposed upon it by this Indenture, and agrees to perform said trusts, but only upon and subject to the following express terms and conditions:

(a) The Trustee, prior to the occurrence of an Event of Default and after the curing of all Events of Default which may have occurred, undertakes to perform such duties and only such duties as are specifically set forth in this Indenture. In case an Event of Default has occurred (which has not been cured or waived), the Trustee shall exercise such of the rights and powers vested in it by this Indenture, and use the same degree of care and skill in the exercise of such rights and powers as an ordinary, prudent man would exercise or use under the circumstances in the conduct of his own affairs; provided, however, that the Trustee shall be entitled to reasonable reliance upon an opinion of counsel as set forth in subsection (b) below.

(b) The Trustee may execute any of the trusts or powers hereof and perform any of its duties by or through attorneys, agents, receivers or employees, but shall be answerable for the conduct of the same in accordance with the standard specified above, and shall be entitled to reasonably rely upon the advice of counsel to the Trustee concerning all matters of trust hereof and the duties hereunder, and may in all cases pay such reasonable compensation to all such attorneys, agents, receivers and employees as may reasonably be employed in connection with the trusts hereof. The Trustee may act upon the opinion or advice of any attorney (who may be the attorney or attorneys for the Authority or the Company) approved by the Trustee in the exercise of reasonable care. The Trustee shall not be responsible for any loss or damage resulting

from any action or inaction in good faith in reliance upon such opinion or advice.

(c) The Trustee shall not be responsible for any recital herein or in the Bonds (except with respect to the certificate of the Trustee endorsed on the Bonds), or for the recording or re-recording, filing or re-filing of this Indenture, or for the validity of the execution by Authority of this Indenture, or any supplements hereto or instruments of further assurance, or for the sufficiency of the security for the Bonds issued hereunder or intended to be secured hereby.

(d) The Trustee shall not be accountable for the use of any Bonds authenticated or delivered hereunder. The Trustee may become the owner of Bonds secured hereby with the same rights which it would have if not the Trustee.

(e) The Trustee shall be protected in acting upon any notice, request, consent, certificate, order, affidavit, letter, telegram or other paper or document believed to be genuine and correct and to have been signed or sent by the proper Person or Persons. Any action taken by the Trustee pursuant to this Indenture upon the request or authority or consent of any Person who at the time of making such request or giving such authority or consent is the owner of any Bond shall be conclusive and binding upon all future owners of the same Bond and upon Bonds issued in exchange therefor or in place thereof.

(f) As to the existence or nonexistence of any fact or as to the sufficiency or validity of any instrument, paper or proceeding, the Trustee shall be entitled to rely upon a certificate signed by the Authority Representative or the Company Representative as sufficient evidence of the facts therein contained and prior to the occurrence of a Default of which the Trustee has been notified as provided in Section 9.01 (h) hereof, or of which by Section 9.01 (h) it is

deemed to have notice, shall also be at liberty to accept a similar certificate to the effect that any particular dealing, transaction or action is necessary or expedient, but may at its discretion secure such further evidence deemed by it to be necessary or advisable, but shall in no case be bound to secure the same. The Trustee may accept a certificate of such officials of the Authority who executed the Bonds (or their successors in office) under the seal of the Authority to the effect that a resolution in the form therein set forth has been adopted by the Authority as conclusive evidence that such resolution has been duly adopted and is in full force and effect.

(g) The permissive right of the Trustee to do things enumerated in this Indenture shall not be construed as a duty, and the Trustee shall not be answerable for other than its negligence or willful default.

(h) The Trustee shall not be required to take notice or be deemed to have notice of any Default hereunder except (i) failure by the Authority to cause to be made any of the payments to the Trustee required to be made by Article IV hereof and (ii) failure by the Authority or the company to file with the Trustee any document required by this Indenture or the Development Agreement or the Public Improvements Assessment and Lien to be so filed subsequent to the issuance of the Bonds, unless the Trustee shall be specifically notified in writing of such Default by the Authority or by the owners of at least twenty-five percent (25%) in aggregate principal amount of Outstanding Bonds, and all notices or other instruments required by this Indenture to be delivered to the Trustee, must, in order to be effective, be delivered at the principal corporate trust office of the Trustee, and in the absence of such notice so delivered the Trustee may conclusively assume there is no Default except as aforesaid.

(i) At any and all reasonable times the Trustee, and its duly authorized agents, attorneys, experts, engineers,

accountants and representatives, shall have the right fully to inspect any and all of the property herein conveyed, including all books and records of the Authority pertaining to the collection of Allocated Assessment Charges and the construction of the Improvements, and to take such memoranda from and with regard thereto as may be desired.

(j) The Trustee shall not be required to give any bond or surety in respect of the execution of the said trusts and powers or otherwise in respect of the premises.

(k) Notwithstanding anything elsewhere in this Indenture with respect to the authentication of any Bonds, the withdrawal of any cash, the release of any property or any action whatsoever within the purview of this Indenture, the Trustee shall have the right, but shall not be required, to demand any showings, certificates, opinions, appraisals or other information, or corporate action or evidence thereof, in addition to that by the terms hereof required as a condition of such action, by the Trustee deemed desirable for the purpose of establishing the right of the Authority to the authentication of any Bonds, the withdrawal of any cash or the taking of any other action by the Trustee.

(l) Before taking the action referred to in Section 8.03 or 8.08 hereof, the Trustee may require that a satisfactory indemnity bond be furnished for the reimbursement of all expenses to which it may be put and to protect it against all liability, except liability which is adjudicated to have resulted from its negligence or willful default in connection with any such action.

(m) All moneys received by the Trustee shall, until used or applied or invested as herein provided, be held in trust for the purposes for which they were received, but need not be segregated from other funds except to the extent required by law.

(n) No provision in this Indenture shall require the Trustee to expend or risk its capital or its own funds or to

incur any financial liability in the exercise of its rights and powers and duties as Trustee under this Indenture.

Section 9.02 *Fees, Charges and Expenses of the Trustee and Paying Agents.* The Trustee shall be entitled to receive, as an inception fee, the sum designated by the Authority from moneys on deposit in the Cost of Issuance Account. The Trustee and any Paying Agents shall also be entitled to payment and reimbursement for reasonable fees for their services rendered hereunder and all advances, counsel fees and other expenses reasonably and necessarily made or incurred by the Trustee in connection with such services solely from moneys made available as permitted by Section 5.09(b) hereof. Upon an Event of Default, but only upon an Event of Default, the Trustee shall have a first lien with right of payment prior to payment on account of principal of, premium, if any, and interest on any Bond upon the Trust Estate for the foregoing fees, charges and expenses incurred by the Trustee.

Section 9.03. *Notice to Bondholders if Default Occurs.* If a Default occurs of which the Trustee is by Section 9.01(h) hereof required to take notice or if notice of Default be given as therein provided, then the Trustee shall promptly give written notice thereof by registered or certified mail to the owner of each Bond shown by the list of Bondholders required by the terms of Section 4.06 hereof to be kept at the principal corporate trust office of the Trustee.

Section 9.04. *Intervention by the Trustee.* In any judicial proceeding to which the Authority or the Company is a party and which in the opinion of the Trustee and its counsel has a substantial bearing on the interests of owners of the Bonds, the Trustee may intervene on behalf of Bondholders and shall do so if requested in writing by the owners of at least twenty-five percent (25%) of the aggregate principal amount of Outstanding Bonds.

Section 9.05. *Successor Trustee.* Any corporation or association into which Trustee may be converted or merged, or with which it may be consolidated, or to which it may sell or transfer its trust business and assets as a whole or substantially as a whole, or any corporation or association resulting from any such conversion, sale, merger, consolidation or transfer to which it is a party, shall be and become successor Trustee hereunder and vested with all of the title to the Trust Estate and all the trusts, powers, discretions, immunities, privileges and all other matters as was its predecessor, without the execution or filing of any instrument or any further act, deed or conveyance on the part of any of the parties hereto, anything hereto to the contrary notwithstanding.

Section 9.06. *Resignation by the Trustee.* The Trustee and any successor Trustee may at any time resign from the trusts hereby created by giving thirty (30) days' written notice by registered or certified mail to the Authority and to the owner of each Bond as shown by the list of Bondholders required by Section 4.06 hereof to be kept by the Trustee, and such resignation shall not take effect until the appointment of a successor Trustee by the Bondholders or by the Authority.

Section 9.07. *Removal of the Trustee.* The Trustee may be removed at any time by an instrument or concurrent instruments in writing delivered to the Trustee and to the Authority and signed by the owners of a majority in aggregate principal amount of Outstanding Bonds.

Section 9.08. *Appointment of Successor Trustee by Bondholders.* In case the Trustee hereunder shall resign or be removed, or be dissolved, or shall be in course of dissolution or liquidation, or otherwise become incapable of acting hereunder, or in case it shall be taken under the control of any public officer or officers, or of a receiver appointed by a court, a successor may be appointed by the owners of a majority in aggregate principal amount of Outstanding Bonds by an instrument or concurrent instruments in writing signed by

such owners, or by their attorneys in fact duly authorized, a copy of which shall be delivered personally or sent by registered mail to the Authority. In case of any such vacancy, the Authority, by an instrument executed, attested and sealed by those of its officials who executed and attested the Bonds, may appoint a temporary Trustee to fill such vacancy until a successor Trustee shall be appointed by the Bondholders in the manner above provided; and such temporary trustee so appointed by the Authority shall immediately and without further act be superseded by the trustee appointed by the Bondholders; provided, however, that in the event the temporary trustee appointed by the Authority shall not be superseded by a trustee appointed by the Bondholders within six (6) months from the effective date of appointment by the Authority, the right of Bondholder to appoint a successor trustee shall be deemed to be waived and the trustee appointed by the Authority shall be deemed to be the Trustee hereunder. Notice of the appointment of a successor Trustee shall be given in the same manner as provided in Section 9.06 hereof with respect to the resignation of a Trustee. Every such Trustee appointed pursuant to the provisions of this Section shall be a trust company or bank in good standing having a reported capital and surplus of not less than $10,000,000 if there be such an institution willing, qualified and able to accept the trust upon customary terms.

Section 9.09. *Concerning Any Successor Trustee.* Every successor Trustee appointed hereunder shall execute, acknowledge and deliver to its or his predecessor and also to the Authority and the Company an instrument in writing accepting such appointment hereunder, and thereupon such successor, without any further act, deed or conveyance, shall become fully vested with all the estates, properties, rights, powers, trusts, duties and obligations of its predecessor; but such predecessor shall, nevertheless, on the written request of the Authority, or of its successor, execute and deliver an instrument transferring to such successor all the estates, properties, rights, powers and trusts of such predecessor

hereunder; and every predecessor the Trustees shall deliver all securities and moneys held by it as the Trustee hereunder to its successor. Should any instrument in writing from the Authority be required by any successor Trustee for more fully and certainly vesting in such successor the estate, rights, powers and duties hereby vested or intended to be vested in the predecessor, any and all such instruments in writing shall, on request, be executed, acknowledged and delivered by the Authority. The resignation of any Trustee and the instrument or instruments removing any Trustee and appointing a successor hereunder, together with all other instruments provided for in this Article, shall be filed or recorded by the successor Trustee in each recording office where the Indenture shall have been filed or recorded.

Section 9.10. *Appointment of Co-Trustee.* It is the purpose of this Indenture that there shall be no violation of any law of any jurisdiction (including particularly the law of the State) denying or restricting the right of banking corporations or associations to transact business as the Trustee in such jurisdiction. It is recognized that in case of litigation under this Indenture or foreclosure under the Public Improvements Assessment and Lien, and in particular in case of the enforcement of any such instruments on Default, or in case the Trustee deems that by reason of any present or future law of any jurisdiction it may not exercise any of the powers, rights or remedies herein granted to the Trustee or hold title to the properties, in trust, as granted herein or in the Public Improvements Assessment and Lien, or take any other action which may be desirable or necessary in connection therewith, it may be necessary that the Trustee appoint an additional individual or institution as a separate or Co-Trustee. The following provisions of this Section are adapted to these ends.

The Trustee may appoint an additional individual or institution as a separate or Co-Trustee, in which event each and every remedy, power, right, claim, demand, cause of action,

immunity, estate, title, interest and lien expressed or intended by this Indenture or be exercised by or vested in or conveyed to the Trustee with respect thereto shall be exercisable by and vest in such separate or Co-Trustee, but only to the extent necessary to enable such separate or Co-Trustee to exercise such powers, rights and remedies, and every covenant and obligation necessary to the exercise thereof by such separate or Co-Trustee shall run to and be enforceable by either of them.

Should any deed, conveyance or instrument in writing from the Authority be required by the separate or Co-Trustee so appointed by the Trustee for more fully and certainly vesting in and confirming to him or it such properties, rights, powers, trusts, duties and obligations, any and all such deeds, conveyances and instruments in writing shall, on request, be executed, acknowledged and delivered by the Authority. In case any separate or Co-Trustee, or a successor to either, shall die, become incapable of acting, resign or be removed, all the estates, properties, rights, powers, trusts, duties and obligations of such separate or Co-Trustee, so far as permitted by law, shall vest in and be exercised by the Trustee until the appointment of a new Trustee or successor to such separate or Co-Trustee.